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No. 656

IN THE

Supreme Court of the United States

October Term, 1946

A. M. ANDERSON, Receiver of the National Bank of Kentucky, Louisville, Kentucky,

Petitioner,

v.

LAWRENCE S. HELMERS, et al.,

Respondents.

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER.

DECISIONS BELOW

The District Court for the Southern District of Ohio overruled respondents' motions to dismiss (R. 23, 30).[1, 2] Though there were about 300 defendants, by agreement, judgment was entered only against four for the purpose of appeal (R. 30). The Sixth Circuit Court of Appeals reversed the District Court and ordered the bill dismissed on the ground that petitioner's bill of complaint showed the cause of action was barred by the Kentucky Statute of Limitations, borrowed under an Ohio Statute (R. 2) (156 F. [2d] 47).

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[1] Not reported.

[2] Pages of that part of Record showing Proceedings in District Court and the part showing Proceedings in Court of Appeals are both numbered from page 1.

This Court granted certiorari and transferred the case to the summary docket, assigning it for argument immediately following No. 593, by order entered December 9, 1946 (15 U. S. Law Week 3224). Case No. 593 is *Cope* v. *Anderson*, decided by the Third Circuit Court of Appeals and with which the decision below is in direct conflict.

JURISDICTION

Jurisdiction is conferred on this Court to review the cause by writ of certiorari by Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (U. S. C., Title 28, § 347).

STATEMENT OF THE CASE

Petitioner, the Receiver of the National Bank of Kentucky, brought this suit, in equity, in the Southern District of Ohio against approximately 300 residents of that state to enforce their liability for an assessment levied by the Comptroller of the Currency against shareholders of the bank. Respondents' liability was an incident of their ownership of stock of a Delaware holding company which actually represented beneficial ownership of the bank's shares. The story is told in the opinion of this Court in *Anderson* v. *Abbott*, 321 U. S. 349, and we deem it unnecessary to more than briefly note these facts.

The National Bank of Kentucky, located in Louisville, Kentucky, closed November 16, 1930 (R. 1). The Comptroller of the Currency found the bank insolvent, appointed a receiver (R. 2), levied a 100 per cent assessment against shareholders, payable April 1, 1931, and directed the receiver to enforce its payment (R. 2).

The shares of the bank were registered in the names of six trustees under a lengthy trust indenture (R. 5). The trustees issued so-called Trustees' Participation Certifi-

cates (R. 6). About 95 per cent of these certificates (R. 9), representing stock of the bank for all purposes, including liability to assessment, were exchanged for shares of stock of a Delaware corporation named "The BancoKentucky Company," hereinafter referred to as "Banco" (R. 13). Banco was organized under the ordinary corporation laws of Delaware with omnibus powers. Unlike the Participation Certificates, the shares issued by Banco purported to be "non-assessable" (R. 14). Banco was a holding company for bank stock, not only the stock of the National Bank of Kentucky but of various other National and State Banks located in Kentucky and Ohio (R. 12).

The Receiver brought suit against Banco for the assessment on the Trustees' Participation Certificates and recovered judgment. *Laurent* v. *Anderson*, 70 Fed (2d) 819 (C. C. A. 6th) (R. 17). Prior to that suit, and solely to preserve his rights against holding company shareholders, the Receiver sent a warning notice to them stating it to be his intention to proceed against Banco, but that he would look to them for any deficiency (R. 16). The Receiver was able to collect only a small part of the assessment from Banco (R. 17). He then brought actions in numerous states against holding company shareholders residing therein to recover the deficiency. The bills of complaint were the same. The Receiver was compelled to sue in equity to disclose the beneficial ownership of the bank's stock in Banco's shareholders and to eliminate the paper partitions they had set up between themselves and direct ownership of the bank's shares which they claimed insulated them from liability. The suit in the Western District of Kentucky became the test case and finally settled the question of the liability of Banco's shareholders. (*Anderson* v. *Abbott*, 321 U. S.

349.) During the pendency of that case, the other suits were held in abeyance.

The present action was commenced December 12, 1936, more than five years but less than six years after the assessment became due. The National Bank Act contains no period of limitations so the limitation of the forum, Ohio, is applicable. The Ohio general statute governing actions to enforce statutory liabilities requires suit within six years. G. C. § 11222. But Ohio also has a "borrowing" statute.

> "*If* the laws *of any* state or *country where the cause of action arose* limits the time for the commencement of the action *to a less number of years* than do the statutes of this state in like causes of action, then said cause of action shall be barred in this state at the expiration of said lesser number of years." G. C. § 11234.[3]

In Kentucky actions on statutory liabilities are subject to the defense of the limitations unless commenced within five years after the cause accrued (Ky. Rev. Stat. § 413.120).

The sole question for decision here is one of substantive federal law—Did petitioner's cause of action arise in a state or country having a period of limitations shorter than Ohio's six year period?

SPECIFICATIONS OF ERROR

1. The Sixth Circuit Court of Appeals erred in reversing the decision of the District Court.

2. The Sixth Circuit Court of Appeals erred in holding petitioner's cause of action arose in Kentucky.

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[3] Emphasis ours throughout this brief.

ARGUMENT

1. What Is Petitioner's Cause of Action?

This Court has defined a cause of action generally as comprising "every fact a plaintiff is obliged to prove in order to obtain judgment, or, conversely, every fact the defendant would have the right to traverse." *Railway Co.* v. *Dixon*, 179 U. S. 131, 139. See also *Martin* v. *N. & W. Railroad Co.*, 43 Fed. (2d) 293, 295.

The National Bank Act provides that shareholders of national banking associations "shall be held individually responsible" to assessment to the extent of the par value of their stock therein "in addition to the amount invested in such stock." U. S. C., Title 12, §§ 63, 64. The Act authorizes the Comptroller of the Currency, when satisfied of insolvency, to appoint a receiver, "who shall proceed to . . . enforce the personal liability of shareholders" "if necessary to pay the debts of such association." U. S. C., Title 12, §§ 191, 192.

This Court has several times discussed the nature of a cause of action against national bank shareholders for assessment.

In *McClaine* v. *Rankin*, 197 U. S. 154, it was held that, apart from federal statute the receiver's "cause of action does not exist," that the basis of such cause of action is the Comptroller's order and that the statute of limitations runs "as against an action to enforce the statutory liability and *not an action for breach of contract.*" The law imposes the liability on the shareholder, secondary to the bank's debts, which remained distinct and to which the stockholder was not a party. Assessment might result as a consequence of the bank's breach of its contract to pay, but liability therefor "is collateral and *statutory*" (p. 161).

Again, in *Pufahl* v. *Parks*, 299 U. S. 217, 223, it was held that a stockholders' obligation to pay an assessment

is rendered absolute by the Comptroller's action in ordering one. "From the moment of the Comptroller's order for assessments the bank's receiver *has a claim which would support an action of debt at common law* against a living stockholder or the executor of a deceased stockholder." In *Brown* v. *O'Keefe,* 300 U. S. 598, 603 it was said: "Liquidation coupled with insolvency is the critical event which is capable of transforming a potential liability into *one presently enforceable* as soon as" a receiver appears upon the scene.

And, in *Anderson* v. *Abbott,* 321 U. S. 349, 356, the Court said that the principles of contract law have no application "to suits to enforce a liability which has this statutory origin. Cf. *Christopher* v. *Norvell,* 201 U. S. 216, 225." The Court there also indicated that these very Banco shareholders' liability was not "bottomed on fault" (p. 366). Their liability arose as "an incidence of ownership" (p. 368).[4]

The National Bank of Kentucky, though domiciled until its suspension in Louisville, Kentucky, has nothing to do with this suit. The petitioner, as Receiver, is an officer of the United States, appointed by the Comptroller of the Currency and subject to the latter's direction. *United States* v. *Weitzel,* 246 U. S. 533; *Anderson* v. *Hershey,* 127 Fed. (2d) 884 (C. C. A. 6th). He sues as a trustee for persons who were creditors of the defunct bank. The order of assessment was a quasi-judicial determination. *Hays* v. *Wilkinson,* 72 Fed. (2d) 201 (C. C. A. 10th). It was the basis of the suit. Respondents are citizens and residents of Ohio. Their liability arose out of the ownership of intangible personal property—BancoKentucky stock. The situs of that stock, "for all

[4] The statute of limitations is not tolled by partial payments because there is no promise, or contract to be so revived. *Briley* v. *Crouch,* 115 Fed. (2d) 443 (C. C. A. 4).

purposes of title'' except taxation, was Delaware by the very terms of their contract of membership in the Delaware corporation. Sec. 73, Del. Corp. Law. For purposes of taxation the situs of the stock was Ohio. 51 Am. Jur., Taxation, pp. 496, 497. Respondents had no contract with anyone with respect to assessment liability. In fact their certificate of stock and the holding company's Articles of Incorporation expressly negated any recognition of such liability.

2. Where a Cause of Action Arises Is Determined with Reference to the Substantive Law Which Shapes It.

The meaning of the Ohio Borrowing Statute is clear. ''If the laws of any state or country where the cause of action arose'' provide a shorter period than Ohio's, then the Ohio courts will adopt that period.

A ''state'' is an organized political society with an established government which exercises sovereign power within the territory occupied by its people. The Ohio statute does not limit the word to the states which comprise our country. Nor is the word ''country'' qualified by ''foreign.'' It says ''any country.'' United States is a ''country.'' And it is the country where petitioner's cause of action arose because that cause was generated solely by federal statute. The court below conceded that ''the liability is created by a law of the United States, *rather than by the law of Kentucky or of any other state.*'' But it was of the opinion that the ''cause of action arose through a combination of that law and the failure to perform the duty imposed by that law'' (R. 12).

The ''country where the cause of action arose'' in the Ohio statute has reference to a system of jurisprudence other than Ohio's, not necessarily to territorial limits. Governments in exile are recognized as sovereign because exercising sovereign power. *Delany* v. *Moraitis*, 136 Fed. (2d) 129, 131.

The place "where" is important only insofar as the laws of that place are controlling. Had respondents agreed to perform some contract in Kentucky, the law of that state would determine the substantive rights of the parties. But here the limits, territorial and otherwise, of the reach of Kentucky law simply have no significance. See *Holmberg* v. *Armbrecht*, 327 U. S. 392.

The court below lost sight of the fact that our federal government and state governments are separate sovereignties.

> "Although the general government and the states exist within the same territorial limits, each form of government, whether Federal or state, is supreme within its sphere, the former as to all powers granted, expressly or impliedly, under the Federal Constitution, and the state as to all other powers." 11 Am. Jur., Constitutional Law, page 866.

The opinion of the court below (R. 12) characterizes petitioner's argument that the cause arose in the "country" as highly theoretical because it disregards the fact that, geographically, the United States comprise the 48 separate states and the District of Columbia. It is said, "If the critical act occurred within the geographical limits of the United States, it necessarily occurred within the geographical limits of one of the forty-eight states or the District of Columbia" (R. 12). The basis of this suit is the Comptroller's order and respondents' ownership of Banco stock. The assessment order was made in Washington which is in the District of Columbia, geographically, but the fact the nation's capital is there has no meaning when the force and effect of the order is considered.

Since the laws of the country creating petitioner's cause of action provided no period of limitations to be

borrowed, it is subject only to the general limitation of the forum. There is no limitation to be borrowed under the exception to the general law of the forum.

3. Failure to Pay Is Not an Essential of Petitioner's Cause of Action and, if It Were, and if the Law Fixed a Place for Payment, Such Fact Would Only Concern the Time When, Not the Place Where, Petitioner's Cause Arose.

The court below was of the opinion that a cause of action arises at the place where the operative facts occur and that it is the happening of the last of such facts which brings the cause of action into existence. It is stated— "Such an act, or the failure to act where there is a duty to do so, is the critical event which transforms a potential liability into one presently enforcible. See *Brown* v. *O'Keefe*, 300 U. S. 598, 603" (R. 8).[8]

Events which mature a cause of action are not necessarily determinative of the place where one arises. In this connection, the opinion below states (R. 8): "A person may execute a note payable in the future. Such an obligation is a liability, but it does not become a cause of action *until* the note matures and the maker fails to pay." But execution of a note does unalterably fix the jurisdiction where the cause of action may arise, by importing that law into the contract. It is the law of the place for payment, if specified, or of the place of execution, if there's no place for payment. What happens thereafter only establishes the "time when." Furthermore, if the analogy of note cases be assumed, the principles of contract law demonstrate that neither failure to pay the Receiver in Louisville or any other place nor the

[8] But *Brown* v. *O'Keefe* held that the "critical event" which transformed the shareholder' potential liability "into one presently enforcible" was "liquidation coupled with insolvency."

location of the bank in Louisville, prescribe where his cause of action arose. Suppose respondents held a note of the National Bank of Kentucky, payable at its offices in Louisville and endorsed it at Cincinnati to petitioner, personally. The note matures, and the bank fails to pay. The cause of action against the bank arose in Kentucky. But the cause of action against respondents arose where they endorsed it, in Ohio. The place of the bank's default would be unimportant in a suit on the endorsement. 11 Am. Jur., Conflict of Laws, § 151, p. 447; *Musson* v. *Lake*, 45 U. S. 262. And in such a suit the endorser's failure to pay is not an essential of the holder's cause of action against him. 8 Am. Jur., Bills and Notes, § 959, p. 566.[a]

The court below enumerated the operative facts in the present case,—(1) a federal statute; (2) insolvency of the bank; (3) the assessment; (4) the maturity of the assessment "by the passage of time to April 1, 1931"; and (5) defendants' failure to pay (R. 8, 9).

The important "operative fact" thus omitted was respondents' connection with the liability through their ownership of Banco stock. The "operative fact"—failure to pay—cannot be found in the bill of complaint.

No case can be found suggesting that a National Bank shareholder's failure to make payment of an assessment at the end of the grace period allowed him by the Comptroller is a fact to be alleged and proved by a Receiver in carrying out his statutory duty to "enforce" shareholders' liability, except the reversed decision by the District Court of Pennsylvania, in *Anderson* v. *An-*

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[a] Respondents incurred or "contracted" liability when they acquired Banco stock, as a statutory incidence of its ownership. *Anderson* v. *Abbott*, 321 U. S. 368. They lived in Ohio. The situs of that property was not Kentucky. And respondents' liability was "collateral and statutory" though arising in consequence of the bank's breach. *McClaine* v. *Rankin*, 197 U. S. 154, 161.

drews, 62 Fed. Supp. 705 (now the *Cope* case) and the decision below.

Having narrowed the issue to the determination of "where the failure to pay the assessment order in the present case occurred," the court below proceeded to answer that question solely by reference to the notice petitioner sent respondents on March 20, 1931 (R. 9). The assessment order fixed no place for payment. The court conceded that the receiver was not expressly authorized by the Comptroller's direction to enforce the assessment, to "designate" or to "fix" a place for payment, but concluded that the Comptroller's authority was broad enough "to include the designation of a place of payment as well as the time of payment, in the absence of any such contrary designation in the *contract* between the parties"[7] (R. 10). It was, of course, logical and reasonable for the Receiver to request payment at his office. But that is an entirely different matter from finding the Receiver empowered by law to "fix" a place for the performance of this "contract" without the assent of those who have always steadfastly denied any duty to pay, either contractual or statutory. No authority can be found for the conclusion that the Receiver could, unilaterally, fix a place for performance of respondents' duty to pay merely because he was directed to "take all necessary proceedings to enforce the assessment."

But, not only did the Receiver have no right to modify Banco shareholders' obligation in this regard, he did not even attempt to do so, as repeatedly decided by the

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[7] In *Anderson* v. *Abbott*, 321 U. S. 349, any element of contractual liability on Banco shareholders' part was denied (pp. 355, 368). The dissenting opinion put it even more forcefully (p. 372).

"On the contrary, by the terms of the stock certificates and by the law of the corporation's being, their shares were fully paid and non-assessable. *These stockholders cannot be said in any way to have assumed any express or implied contractual assessment liability.*"

court below. The notice to which reference was made had been discussed in *Anderson* v. *Abbott*, 127 Fed. (2d) 696, 699; again in *Abel* v. *Anderson*, 148 Fed. (2d) 372, and it was construed by this Court in *Anderson* v. *Abbott*, 321 U. S. 349, 354. All it purported to do was to warn holding company shareholders that the Receiver intended to look to them for what he was unable to recover from the holding company. It was in anticipation of the defense, later asserted and overruled, of election of remedies. See *Anderson* v. *Atkinson*, 22 Fed. Supp. 853, 855.

This warning notice was sent to Banco shareholders March 20, 1931. Had that notice purported to be a demand upon them for payment of the assessment at any place before April 1, 1931, the demand would have been premature. In *Fisher* v. *Whiton*, 317 U. S. 217, this Court held that the Receiver had no right to demand payment until the date fixed therefor by the Comptroller.

The period from the date the assessment was levied until it became payable was merely a grace period allowed by the Comptroller. *Strassburger* v. *Schram*, 93 Fed. (2d) 246; *Reich* v. *Van Dyke*, 107 Fed. (2d) 682. National bank's stockholders are not entitled to such a grace period as a matter of right. It is not even necessary that they be notified of the assessment. *Brown* v. *Ellis*, 103 Fed. 834; *Rankin* v. *Miller*, 207 Fed. 602, 611. Only one fact occurred subsequent to the order of assessment here which had any connection with the Receiver's cause of action—the arrival of April 1, 1931. *Rawlings* v. *Ray*, 312 U. S. 96, 98, and this Court's comments on *Pufahl* v. *Estate of Parks*. That event was not confined to Kentucky.

The court below was led to err by its acceptance of respondents' argument that principles of tort and contract cases are applicable here. The three cases cited in

the opinion (R. 11) involved suits for damages arising from wrongful acts. In each of those three cases the plaintiff had an opportunity of suing the wrongdoer in the state whose period of limitations was borrowed. The inference is justified that the forum of suit was deliberately selected to secure the advantage of a longer period of limitations. Petitioner had no such choice in the instant case. He never could have sued in Kentucky.

The court below accepted the conclusion of this Court that Banco shareholders' liability existed without fault[6] on their part but avoided applying it by an assumed distinction in this regard between a "liability" and a "cause of action." It is said the "cause of action came into existence by reason of the failure of the defendants to pay the assessment at the time and place provided. A failure to perform a legal duty at the time required is equivalent in the present case to an affirmative act" (R. 11). If that fact were important it might be the equivalent, in the sense of accruing a cause of action, or in incurring a liability, but certainly not in the sense of *where* a cause of action may arise. In both tort and contract cases the place where liability, potential as it may be, is incurred determines where the cause of action arose. An affirmative act has location. Respondents' only affirmative act was their acquisition of Banco stock.

The court below suggested that, if Banco stockholders had paid the Receiver before April 1, 1931, no cause of action would have at any time arisen or existed against them (R. 9). If that be true, a necessary allegation in petitioner's bill of complaint would have been that the

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[6] There was no dissent on this point in *Anderson* v. *Abbott*, 321 U. S. 349. The majority said the liability was "not bottomed on fault" (p. 366) and the dissenting opinion said "We are dealing with a variety of liability without fault" (p. 380). And the court was not discussing a mere potential liability, but a matured cause of action against Banco shareholders.

respondents had failed to pay. For centuries it has been the law that payment is an affirmative defense and evidence thereof usually may not be received unless specially pleaded, even in cases where a petitioner has unnecessarily alleged non-payment. Annotation 100 A. L. R. 264; *Kalloch* v. *Hoagland*, 239 Fed. 252 (C. C. A. 6th). Rule VIII of the Federal Rules is to the same effect. Non-payment cannot generate a cause of action. Payment, if pleaded and proved, will extinguish a cause of action.

The defense of limitations was only one of the many grounds included in respondents' motion to dismiss. One of the other grounds was— "There are no facts alleged sufficient to constitute a valid cause of action in equity" (R. 21, 22). That ground has been abandoned by respondents. Not since the District Court found the bill to state a good cause of action, in *Anderson* v. *Abbott*, 23 F. Supp. 265, has anyone suggested that it does not. Nevertheless, the Court below localized petitioner's cause of action in Kentucky because of respondent's failure to pay there, a fact not alleged at all.

The effect of the conclusion, that respondents' failure to pay was a "critical event," the last "operative fact" essential to petitioner's cause of action and localized in Kentucky, is to hold petitioner's failure to negative a non-existent defense resulted in his bill of complaint stating no cause of action.

CONCLUSION

The cause of action arose in the "country," the statutes of which provide no limitation to be borrowed. Petitioner's cause of action and right of action involved only two ultimate facts, namely, respondents' ownership of property subjecting them to liability under national law and the recitation of the necessity of an officer of

the National Government enforcing that liability. The only traversable facts were those showing respondents' status as shareholders of the bank. The law of the country, plus that status, presented a cause of action. The actionable consequences of acts giving rise to a cause of action in tort or in contract are determined with reference to the *lex* loci. So far as this cause of action is concerned, the law of Kentucky and the territorial limitations of that state do not exist.

It is respectfully submitted that the decision of the court below should be reversed.

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